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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 62

SAMUEL SPEVACK,

Petitioner,

—v.—

SOLOMON A. KLEIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner seeks review of an order of the New York Court of Appeals, entered December 1, 1965, which unanimously affirmed an order of the Appellate Division, Second Judicial Department disbarring petitioner from the practice of law for professional misconduct.

Opinions Below

The memorandum opinion of the Appellate Division (App. B of Petition) is reported in 24 AD 2d 653. The memorandum order of the Court of Appeals (App. C of Petition) is reported in 16 NY 2d 1048. The amended remittitur of the Court of Appeals has not yet been reported and is printed as Appendix D of the Petition.

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Statement of the Case

1.

Petitioner's disbarment arises out of an investigation ordered by the New York Appellate Division, which is charged by statute with the duty to supervise the professional conduct of attorneys. See N.Y. Judiciary Law, sec. 90, subd. 2. In performing this duty the Court has sought to control speculative financing of personal injury claims by attorneys who abuse the privilege to engage in contingent-fee practice. *See Gair* v. *Peck*, 6 NY 2d 97, 101-108, 111, certiorari denied 361 U.S. 374; MacKinnon, Contingent Fees for Legal Services, A Study of Professional Economics and Responsibilities, at 160-167 (1964).

Maintenance of the contingent-fee privilege—completely outlawed by earlier law—is deemed necessary to put the courts of justice within the reach of the poor citizen who has a meritorious cause of action for personal injuries but is financially unable to pay a fixed fee for representation by experienced counsel. *Gair v. Peck, supra,* 6 NY 2d at 103, 105-106; MacKinnon, Contingent Fees, etc., *supra,* at 5, 70; Radin, Contingent Fees in California, 28 Cal. Law Rev. 587, 589 (1940).

Experience, however, has demonstrated that the privilege to acquire a contingent financial interest in personal injury claims needs to be controlled in the interest of both the injured claimants and the due administration of justice. Overreaching by exaction of excessive fees from injured laymen, ignorant of law and pressed by financial need; unwarranted payments to referrers to encourage referrals of personal injury cases; congestion of court calendars by unworthy claims never intended to be brought

to trial, thereby causing long delays in bringing legitimate cases to trial—delays which amount to a denial of justice for those in need of prompt financial relief—are some of the evils fostered by the contingent-fee opportunity for financial gain. See, for example, *Anonymous* v. *Baker*, 360 U.S. 288, 289, fn 1; *Gair* v. *Peck*, *supra*, 6 NY 2d at 106-112.

To eliminate these evils the State could, of course, revert to outright abolition of the contingent-fee privilege. But, as above noted, this would impose an unjust burden upon the impoverished who would not otherwise be able to afford legal assistance.

The New York Appellate Division, in both the First and Second Judicial Departments, has therefore enacted Special Rules Regulating the Conduct of Attorneys who choose to avail themselves of the privilege to engage in contingent-fee personal injury practice. See Special Rules of the Second Department printed as an Appendix to this brief.

Rule 2 declares that an attorney who violates any of the special rules shall be deemed to be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law. Rule 3 requires the attorney to file with the Appellate Division retainer statements setting forth the percentage of the contingent-fee agreement and the source of the retainer.[1] Rule 4 requires that funds collected on behalf of the client be deposited forthwith in

1. Since July 1, 1960, such statements must be filed with the Judicial Conference of the State of New York. See Civil Practice Annual of New York (1964), Part Three of the Rules of the Appellate Division Second Department, Rule 4(a).

a special account, separate from his personal account. It also prohibits commingling with the attorney's own funds and directs him to give the client a closing statement setting forth the amount and date of receipt of the funds and the amount which he claims to be due for his services and disbursements. And Rule 5 imposes the obligation to preserve for a period of at least five years after settlement or other termination of the case:

> "the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof."

This record-keeping requirement of Rule 5 encompassed the financial records specified in the Appellate Division's subpoena duces tecum directing petitioner to produce them. His motion to quash the subpoena was litigated in a separate proceeding which resulted in a denial of his challenge to its validity. *Matter of Anonymous (No. 14)* v. *Arkwright*, 7 AD 2d 874, leave to appeal denied 5 NY 2d 710, certiorari denied 359 U.S. 1009. And in affirming petitioner's disbarment for refusing to produce the records the New York Court of Appeals held that the records specified in the subpoena were "records required by law to be kept by him". *Matter of Spevack*, 16 NY 2d 1048, 1050. See also the Court of Appeals amended remittitur printed as Appendix D of the Petition.

2.

It was pursuant to the foregoing Special Rules that petitioner engaged in contingent-fee personal injury claims on a large scale. Some idea of the extent of his contingent financial interest in such claims is indicated by the fact that between 1953 and the end of June 1960 he filed with

the Appellate Division 1062 contingent-fee retainer statements required to be filed by Rule 3 (R. 3-7; Exh. 1).[2]

But when petitioner was called upon to produce the records specified in the subpoena duces tecum—"pertaining to (his) business as an attorney" (R. 160; Exh. 11)—he refused on constitutional grounds and on advice of his counsel to produce any one of the required records (R. 59-60, 117-119). His first refusal on the ground that production of the records "may tend to incriminate or degrade (him) or to subject (him) to some penalty or forfeiture" (R. 60) was interposed on June 26, 1959 (R. 47), which was before this Court decided the case of *Cohen* v. *Hurley*, 366 U.S. 117 (1961), rehearing denied 374 U.S. 857 (1963), second petition for rehearing denied 379 U.S. 870 (1964).

After this Court's decision in the *Cohen* case petitioner wrote a letter to the Justice presiding at the Judicial Inquiry, dated July 6, 1961, which was forwarded by his counsel (R. 147-148, Exh. 4). The letter reads as follows:

> "Sir:
>
> In view of the recent decision by the Supreme Court in the Cohen matter, I hereby state that I wish to withdraw the constitutional privilege against incrimination heretofore interposed by me before your Honor, during the course of the Judicial Inquiry, which I then asserted in good faith, upon the advice of counsel, and in the sincere belief that I then had the right to do so.
>
> I am willing to testify and answer questions concerning relevant matters.
>
> Respectfully yours,
>
> (Signed) SAMUEL SPEVACK"

---

2. Petitioner's subsequent retainer statements were required to be filed with the Judicial Conference of the State of New York. See note 1, *supra*.

Thereafter petitioner's counsel obtained two adjournments upon the representation that whatever records called for by the subpoena were available would be produced (R. 76-90). Petitioner then retained new counsel who requested a further adjournment and represented:

> "The Court: How about the production of the records, counsel?
>
> Mr. Shatzkin: If your Honor pleases, we intend to produce the records called for by the subpoena. We had made all those arrangements on Friday. We intended producing them here this morning" (R. 97).

Relying thereon, the court granted an adjournment to December 4, 1961 (R. 97-98). But on the adjourned date petitioner did not appear. His counsel requested a further adjournment (R. 100-101) and indicated that petitioner may have changed his mind and might refuse to comply with the subpoena (R. 103-104). The court then granted another adjournment to January 10, 1962 (R. 105).

Finally, on the adjourned date petitioner appeared with his counsel, but not with the records. Instead, an application was made for a still further adjournment. This time the court denied the request and directed that the record be produced (R. 106-113).

Thereupon petitioner's counsel informed the court that he had advised "in the event" a further adjournment were denied, petitioner should "assert all of his constitutional privileges under the Constitution of the United States and under the Constitution of the State of New York" (R. 113-114). When the court refused to change its decision, petitioner was called to the witness stand. In view of his written request to the court, above quoted, he was asked whether

he wished to withdraw his prior claim of privilege. His reply was that upon the advice of counsel he was:

> "obliged not to produce any of the records or to answer any questions in relation thereto on the ground that the answers might tend to degrade or incriminate me, or subject me to a forfeiture or a penalty" (R. 117).

Faced with this refusal, the examiner asked not a single question other than whether petitioner refused to produce each of the records specified in the subpoena (R. 118-119). And when petitioner reiterated his claim of privilege as to each of the records, he was told that disciplinary proceedings would be instituted (R. 134-135).

Thus, the case does not rest upon petitioner's refusal to answer questions which might tend to incriminate him, but rather upon his refusal to produce any of the records required by law to be kept as a condition for his engaging in contingent-fee practice, and upon his blanket refusal to answer any questions which might be asked in relation thereto.[3]

3.

In affirming the order of disbarment the New York Court of Appeals rendered a memorandum decision in which it held (16 N Y 2d 1048, 1050):

> "Order affirmed on the authority of *Cohen* v. *Hurley* (366 U.S. 117) and on the further ground

3. At the disciplinary proceeding petitioner again refused to answer questions which might be put to him. He acknowledged that he was the respondent in the proceeding and that he was admitted to the bar, but on being asked whether after his admission he engaged in the practice of law he refused on constitutional grounds "to answer any questions other than that which I have already answered" (R. 164-16).

> that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis* v. *United States,* 328 U.S. 582; *Shapiro* v. *United States,* 335 U.S. 1)."

Thereafter the Court amended its remittitur which reads as follows (App. D of Pet.):

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended that his disbarment, based upon his refusal to produce any of the records specified in the subpoena duces tecum, duly issued in a judicial inquiry into professional conduct, and based upon his prior refusal to answer any questions which might be asked relating thereto, violated his constitutional privilege against self-incrimination and his constitutional right to due process of law. The Court of Appeals held there was no violation of any of the appellant's constitutional rights."

ARGUMENT

Petitioner asserts that his disbarment "was based upon invocation of his privilege under the Fifth Amendment" (Pet. p. 9), that he was disbarred "for his refusal to relinquish his privilege against self-incrimination" (Pet. p. 11) and for his refusal "to answer questions" which might tend to incriminate him (Pet. pp. 17-18).

These assertions ignore the actual basis upon which the order of disbarment was affirmed by the New York Court of Appeals, whose decision petitioner seeks to have reviewed. As shown by the Court of Appeal's memorandum-decision

and amended remittitur, the basis for the affirmance is that petitioner has no Fifth Amendment right to refuse to produce "records required by law to be kept by him (*Davis* v. *United States*, 328 U.S. 582; *Shapiro* v. *United States*, 335 U.S. 1)" or to interpose a blanket refusal "to answer any questions which might be asked relating thereto."

This factual and legal basis upon which the affirmance of the order of disbarment rests is not in conflict with the decision in *Malloy* v. *Hogan*, 378 U.S. 1, or with the applicable federal law defining the reach of the Fifth Amendment privilege against self-incrimination. Indeed, after extended argument on peripheral matters (Pet. pp. 6-16), petitioner finds it necessary to contend that this Court's decision in *Shapiro* v. *United States*, *supra*, "is no longer valid" and that the required records doctrine of the case should be "reconsidered and rejected" as "an unwarranted limitation upon the scope of the privilege" (Pet. pp. 18, 20).

Thus, in effect, on the crucial issue of the case petitioner is seeking certiorari upon the contention that the New York Court of Appeals erred by following this Court's mandate requiring the States to apply the federal standards of Fifth Amendment privilege against self-incrimination. See *Malloy* v. *Hogan*, *supra*, at p. 11.

Surely, this does not present a federal question.

Nor is there any merit to petitioner's further contention that he had a constitutional right to refuse "to answer questions" (Pet. p. 17). The fact is that he was never asked a single question other than whether he refused to produce the required records. His blanket refusal "to answer any questions in relation thereto" (R. 117) does not cloak him

with constitutional privilege. The federal privilege of a witness aganist self-incrimination may not be asserted in advance of specific questions actually propounded, the answer to which might tend to incriminate him. *Hoffman* v. *United States*, 341 U.S. 479; *McPhaul* v. *United States*, 364 U.S. 372; *United States* v. *Harmon*, 339 F. 2d 354, 359, cert. denied, 380 U.S. 944.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondent, Attorney Pro Se

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APPENDIX

United States Constitution, Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

United States Constitution, Amendment XIV

Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Section 90 of New York Judiciary Law

1. . . .

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct . . . or any conduct prejudicial to the administration of justice. . . .

Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department

Rule 2. Penalty. An attorney who violates any of these special rules shall be deemed to be guilty of professional misconduct within the meaning of subdivision two of section 90 of the Judiciary Law.

Rule 3. Statements as to retainers in actions or claims arising from personal injuries. . . . Every attorney who, in connection with any action or claim for damages for personal injuries . . . accepts a retainer or enters into an agreement, express or implied, for compensation for serv-

ices rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of any such retainer or agreement of compensation, sign and file in the office of the clerk of the Appellate Division, Second Judicial Department, a written statement setting forth the date of any such retainer or agreement of compensation, the terms of compensation, the name and home address of the client and the name and office address of the attorney, and the date and place of the occurrence of the injury. . . .

Rule 4. Deposit of collections-notice. Where an attorney who has accepted a retainer or entered into an agreement as referred to in the preceding rule, shall collect any sum of money upon any such action, claim or proceeding, either by way of settlement or after a trial or hearing, he shall forthwith deposit the same in a bank or trust company in a special account, separate from his own personal account and shall not commingle the same with his own funds. Within ten days after the receipt of any such sum he shall cause to be delivered personally to such client or sent by registered mail, addressed to such client at the client's last known address, a statement in writing setting forth the amount received, the date when and the name of the person from whom he received the same, and the amount which he claims to be due for his services and disbursements, specifying the same separately. At the same time the attorney shall pay or remit to the client the amount shown by such statement to be due the client, and he may then withdraw

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